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FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER
LLP
901 NEW YORK AVENUE, NW
WASHINGTON, DC 20001-4413

EXAMINER

STREGE, JOHN B

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Please find below and/or attached an Office communication concerning this application or proceeding.

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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/024,615
Filing Date: December 21, 2001
Appellant(s): RUBINSTENN ET AL.

MAILED

AUG 08 2007

Technology Center 2600

Anthony M. Gutowski
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed April 2, 2007 appealing from the Office action mailed 10/17/06.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

Japanese Patent Publication No. 2001104050 Nagaishi

20010037191	Furuta	11-2001
6,504,546	Cosatto	1-2003

20030164955

Vinas et al.

9-2003

Nobori et al., Image Synthesis System Using 3D Model-based Coding Simulates Facial Expressions and Aging, IEEE, 1992, pages 394-395)

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 2-6,8-17,19-27,32, 38-39, and 41-44 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nagaishi JP 2001104050 (machine translation provided) in view of Furuta et al. US. Patent Publication 20010037191 (hereinafter "Furuta").

Naigaishi discloses a method of enabling an analysis using a facial image (giving the users proper advice by importing face images of the users and conducting image processing, paragraph 0004), the method comprising: facilitating processing of the facial image to enable a beauty analysis (paragraph 0013 discloses extracting face images of a user); analyzing the at least one external body condition via the image (paragraph 0013 discloses analyzing the face images and obtaining information indicating skin condition from the analysis); and proposing (advice is given as to the makeup for the subject to wear [0013] and this indicates which cosmetics are best for the user together with its usage which can be displayed [0019]) to the subject an aesthetic feature for

affecting the at least one external body condition based, at least in part, on the analyzing of the external body condition (paragraph [0013]).

Naigaishi does not explicitly disclose that the method uses a three-dimensional facial image and thus does not disclose facilitating construction of a three-dimensional facial image using at least one captured image of a subject's face.

Furuta discloses a three-dimensional beauty simulation client-server system which is capable of handling a users face in a three-dimensional fashion and of providing more realistic beauty simulations (first sentence of the abstract). As seen in figure 3 multiple cameras are disclosed (1a, 1b) and the images are sent to the 3D face model generating unit 2. Alternatively if the user has a camera-equipped computer or internet cellular phone, a plurality of images obtained therefrom may be sent to the server, enabling the server 10 (figure 1) to construct a 3D face model (paragraph 32). Also disclosed is the makeup simulation unit 3 that allows simulations of makeup, cosmetic surgery, clothing, perfume, accessories, hair style, etc. based on the 3D information (paragraph 41). Using this simulation the consumers face may be reproduced with the new makeup style, etc. (paragraph 38). Furuta discloses that there is a problem with prior art systems in which the two dimensional image processing did not appear realistic, thus proposes making the system three dimensional (paragraphs 5 and 6 of page 1). Furthermore it is noted that Naigaishi provides all the requisite equipment in order to make the system three-dimensional. In paragraph 0034 of Naigaishi it is disclosed that two cameras can be installed on both sides of the user and that the images from both cameras can be mixed to get the front face image for a

person. Thus since Naigaishi discloses a plurality of images taken from different directions it would be possible to facilitate the three-dimensional system of Furuta without making any modifications to the hardware of Naigaishi.

Naigaishi and Furuta are analogous art because they are from the same field of endeavor of image processing for beauty consultation purposes.

At the time of the invention it would have been obvious to one of ordinary skill in the art to modify Naigaishi's two-dimensional system to make it three-dimensional according to the teachings of Furuta. The motivation for doing so would be to provide realistic beauty simulations that allow the consumer to see how they would look with the product. Thus it would have been obvious to one of ordinary skill in the art at the time of the invention to combine Naigaishi and Furuta to obtain the invention of claim 20.

Furthermore the Examiner argues that the combination of Naigaishi and Furuta is obvious because it is applying a known technique to a known device ready for improvement to yield predictable results (See Ex parte Smith, Bd. Pat. App. & Interf. June 25, 2007. <http://www.uspto.gov/web/offices/dcom/bpai/prec/fd071925.pdf>).

Naigaishi discloses a base device of enabling a beauty analysis using image processing and also discloses that separate cameras can be used from different angles and their images combined. Furuta discloses a well known technique of taking multiple images and combining them to form three dimensional images. On of ordinary skill in the art would have recognized that applying the known technique of Furuta to the system of Naigaishi would have yielded the predictable result of analyzing a three-dimensional image to propose to the subject a makeup for affecting the skin condition.

Furthermore the Examiner argues that known work in one field of endeavor may prompt variations of it for use in either the same field or a different one based on design incentives or other market forces if the variations would have been predictable to one of ordinary skill in the art (See Ex parte Smith, Bd. Pat. App. & Interf. June 25, 2007. <http://www.uspto.gov/web/offices/dcom/bpai/prec/fd071925.pdf>). It is noted that the scope and content of Naigaishi and Furuta are in the same field of endeavor of selling cosmetics. There would be a design incentive which would have prompted one of ordinary skill in the art to adapt Naigaishi to make a three-dimensional beauty simulation since it would allow the user to form a more realistic picture of how the makeup would affect them. The difference between Naigaishi and Furuta is that Naigaishi uses two-dimensional images whereas Furuta discloses three dimensional images. Converting two-dimensional images to three-dimensional images is a principal that is well known in the field of image processing as disclosed by Furuta. One of ordinary skill in the art in view of the design incentives that a three-dimensional image would be more realistic than the two-dimensional images would have predicted that implementing the teachings of Furuta to the system of Naigaishi would allow the system of Naigaishi to be more realistic looking and thus sell more of the cosmetic product.

Regarding claims 2-5, and 21-24 Furuta discloses that the means of the invention may be realized through software (paragraphs 161-162). Furthermore the server consists of a data control unit for storing information (10c figure 1).

Regarding claim 6, makeup is a beauty product.

Regarding claim 8, Furuta discloses that using morphing technology can enable one to resemble one's favorite model, and the user can learn what percentage of the image comprises her own features and what percentage comprises the models features (paragraph 41). Furthermore a simulation in which the level of beauty and degree of aging of the face are assessed can be carried out (paragraph 43).

Regarding claim 9, Furuta discloses that the makeup simulation drawing software uses a method in which the face as a whole is made up by applying makeup to individual parts of the face, and the part of the face is selected by the user including lips, eyebrows etc. In this method the sought makeup style is pasted onto the image (paragraph 57).

Regarding claim 10-11, as discussed Furuta discloses makeup.

Regarding claim 12, Furuta discloses that it is possible to view the face from various angles, as if the camera viewpoint had continuously moved (paragraph 104).

Claim 13 is dependent on claim 1 (rejected above by Furuta) and recites instructing the subject on how to transmit the at least one captured image to a location remote from the subject, wherein the three-dimensional representation is constructed at the remote location. Furuta discloses that the consumer may send images to the server to construct 3D face data (paragraph 32). Furuta does not explicitly disclose instructing the subject on how to transmit the image. It is obvious that the internet site used to submit the images would provide some instruction as to how to submit the images, so that the user could avoid frustration of trying to find out for themselves how to do it, and

thus experience a pleasant shopping experience and want to return in the future for more shopping.

Claim 14 discloses prompting the subject to capture the at least one image of the subjects face. Furuta discloses that images may be captured (paragraph 32). It would be obvious to prompt the user before taking the image so that an image of the user with his eyes closed or in an awkward position would not be used for the later analysis.

Regarding claim 15, Furuta discloses that the processing can take place through the internet to allow for analyzing the image at a location remote from the subject.

Regarding claim 16, as seen in figure 3 a plurality of cameras (1a 1b) are used to capture a plurality of facial images.

Regarding claim 17, Furuta discloses the facial image generator beginning with paragraph 108 in which a three dimensional structure (frame) is used in coordination with the captured images.

Regarding claim 19, the evaluation can take place over an internet connection (11 figure 1) allowing for analyzing at a location remote from the subject.

Regarding claim 25, Furuta discloses that using morphing technology information to enable one to resemble one's favorite model may be obtained, for example intermediate images resembling a cross between the user and their favorite model may be created (paragraph 41).

Claim 26 is similar to claim 1, except it is directed to a computer readable medium. Thus the same arguments used for the rejection of claim 1 apply equally to the rejection of claim 26.

Claim 27 is similar to claim 1, except it is directed to a system. Thus the same arguments used for the rejection of claim 1 apply equally to the rejection of claim 27.

Regarding claims 32 and 39, Furuta discloses a makeup simulation unit 3 using the facial model.

Regarding claim 38, Nagaishi discloses analyzing the face image and outputting information showing the condition of the skin, and since advice is given based on the condition of the skin the extent and severity of the skin condition must be determined.

Regarding claims 41-42 Furuta discloses that each face has its own light and dark effects which are taken into account in the simulation (paragraph 45).

Regarding claims 43-44, if a three-dimensional image is viewed straight on then it will appear two dimensional.

Claims 28-31, and 40 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nagaishi JP 2001104050 in view of Furuta et al. US. Patent Publication 20010037191 (hereinafter "Furuta") and further in view Nobori et al. *Image Synthesis System Using 3D Model-based Coding Simulates Facial Expressions and Aging* (hereinafter "Nobori", cited in the IDS 8/22/06).

Regarding claim 28 Nagaishi nor Furuta explicitly disclose facilitation construction of a three-dimensional facial image using at least one captured image of a subject's face comprises applying the at least one captured image in a virtual manner on a three-dimensional frame.

Nobori discloses a fitting algorithm using a polygonal wireframe model to obtain a synthesized 3d face model (section 2). This provides a practical approach for forming the synthesized 3d model (conclusion).

Naigaishi, Furuta, and Nobori are analogous art because they are all from the same field of endeavor of image processing for beauty consultation purposes.

At the time of the invention it would have been obvious to one of ordinary skill in the art to make the 3d model as discussed by Furuta using a 3d frame. The prior art of Furuta disclosed forming three dimensional images of the user but does not explicitly disclose the details of how this is done. It is well known to use a polygonal wireframe model to obtain a 3d face model as disclosed by Nobori. One of ordinary skill in the art could have substituted the system of forming a polygonal wireframe model to obtain the synthesized 3d model of Furuta in a way that would be predictable to one of ordinary skill in the art. Thus it would have been obvious to one of ordinary skill in the art to combine Naigaishi, Furuta and Nobori to obtain the invention of claim 28.

Regarding claim 29, as seen in figure 1 Nobori discloses a virtual wire mesh.

Regarding claim 30-31, Nobori discloses generating the frame based on stored and inputted information (figure 1).

Regarding claim 40, Nobori discloses adding a dimensional effect to the three-dimensional facial image (section 2).

Claims 33-36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Nagaishi JP 2001104050 in view of Furuta et al. US. Patent Publication 20010037191 (hereinafter "Furuta") and further in view of Cosatto et al. USPN 6,504,546 (hereinafter "Cosatto").

Nagaishi nor Furuta explicitly disclose enabling a calibration of the three-dimensional facial image to address a perceived difference between the three-dimensional facial image and the subjects face.

Cosatto discloses a method for modeling three-dimensional objects wherein using color calibration periodically the appearances of facial features can be tracked. In this manner reliable measurements of the outline of the facial features are obtained (col. 8 lines 15-41).

Nagaishi, Furuta, and Cosatto are all analogous art because they are all from the same field of endeavor of facial imaging.

At the time of the invention it would have been obvious to one of ordinary skill in the art to enable calibration within the inventions of Nagaishi and Furuta as taught by Cosatto. The motivation for doing so is that changes in the appearances of the facial features can be easily tracked. Thus it would have been obvious to one of ordinary skill in the art at the time of the invention to combine Nagaishi, Furuta, and Cosatto in order to obtain the invention as specified in claim 33.

Regarding claim 34, as discussed Cosatto discloses color calibration.

Regarding claim 35, Furuta discloses a makeup simulation unit 3 using the facial model.

Regarding claim 36, Cosatto discloses the color-calibrated three-dimensional facial image and Furuta discloses a makeup simulation unit 3 using the facial model.

Claim 37 is rejected under 35 U.S.C. 103(a) as being unpatentable over Nagaishi JP 2001104050 in view of Furuta et al. US. Patent Publication 20010037191 (hereinafter "Furuta") in view of Cosatto et al. USPN 6,504,546 (hereinafter "Cosatto"), and further in view of Vinas et al. USPGPUB 2003/0164955 (hereinafter "Vinas").

Cosatto discloses color calibration and tracking changes in the appearances of facial feature, however does not explicitly disclose allowing the user to manually calibrate the image. It is well known to allow manual color calibration in image processing. Vinas discloses that if a user is very sensitive to color issues then he may manually initiate a color calibration process at any time (paragraph 46).

Cosatto and Vinas are analogous art because they are from the same field of endeavor of color calibration.

At the time of the invention it would have been obvious to one of ordinary skill in the art to combine Cosatto and Vinas to allow for manual color calibration since it would give the user more control of the process if they are color sensitive. Thus it would have been obvious to one of ordinary skill in the art to combine Nagaishi, Furuta, Cosatto, and Vinas to obtain the invention as specified in claim 37.

(10) Response to Argument

Summary of Arguments:

Appellant argues the following:

A1. Naigaishi and Furuta do not disclose or suggest the subject matter recited in claims 2-6, 8-17, 19-27, 32, 38-39, and 41-44, specifically "analyzing...at least one external body condition via [a] three dimensional image; and proposing to [a] subject an aesthetic feature for affecting the at least one external body condition based, at least in part, on the analyzing of the external body condition."

A2. The requisite motivation for modifying Nagaishi in view of Furuta is lacking and that the Examiner is using improper hindsight to piece together isolated disclosures of the cited references.

B1. Naigaishi, Furuta and Nobori do not disclose or suggest the subject matter recited in claims 28-31 and 40.

B2. The requisite motivation for modifying Nagaishi in view of Furuta and further in view of Nobori is lacking.

C1. Naigaishi, Furuta and Cosatto do not disclose or suggest the subject matter recited in claims 33-36.

C2. The requisite motivation for modifying Nagaishi in view of Furuta and further in view of Cosatto is lacking.

D1. Naigaishi, Furuta and Cosatto and Vinas do not disclose or suggest the subject matter recited in claim 37.

D2. The requisite motivation for modifying Nagaishi in view of Furuta in view of Cosatto, and further in view of Vinas is lacking.

Examiner's response

A1. In regard to item 1, the Examiner respectfully disagrees. The Examiner has pointed out that Naigaishi does teach proposing to the subject an aesthetic feature (makeup) for affecting the at least one external body condition (skin) base, at least in part, on the analyzing of the external body condition. The Examiner does not rely upon Naigaishi in order to teach that the analysis is via a three dimensional image, but instead relies upon Furuta. Furthermore the Examiner provides a motivation to combine Naigaishi with Furuta based on the teaching of Furuta that 3D simulations provide more realistic beauty simulations. Furthermore as discussed above, in paragraph (0034) of Naigaishi it is disclosed that the system can be composed of two cameras that are installed on both sides and that the images from both cameras can be mixed to get the front face image of the person. Thus the hardware (multiple cameras at different angles) necessary to make the images three-dimensional as taught by Furuta is already in place in Naigaishi such that the teachings of Furuta could be implemented without any major modifications to the hardware of Naigaishi. Thus the combination of the references as discussed by the Examiner provide for "analyzing...at least one external body condition via three dimensional image and proposing to the subject an aesthetic feature for affecting the at least one external body condition based at least in part on the analyzing for the external body condition.

A2. The Examiner respectfully disagrees that the motivation for combining Naigaishi and Furuta is lacking. Primarily the Examiner points to the motivation taught by Furuta

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that handling a users face in a three-dimensional fashion provides a more realistic beauty simulation which is taken directly from the reference. Furuta discloses that there is a problem with a conventional beauty simulation apparatus that it can only carry out flat image processing and does not appear realistic (paragraph [0005] of Furuta). To overcome this unrealistic appearance Furuta discloses making the system three-dimensional in order to provide a more realistic beauty simulation (paragraph [0006]). As discussed in the rejection above, Naigaishi is one such system as is discussed by Furuta that only looks at the images in a two dimensional manner. Thus since Naigaishi and Furuta are analogous art since both deal with selling cosmetics to a user, it would have been obvious to one of ordinary skill in the art to combine Naigaishi and Furuta to use three-dimensional images as explicitly taught by Furuta with the explicit motivation that it would create a more realistic beauty simulation.

Furthermore the Examiner responds to the Applicant's arguments regarding the motivation to combine Naigaishi and Furuta by referring to the recent board decision of KSR which forecloses the argument that a specific teaching, suggestion, or motivation is required to support a finding of obviousness (See Ex parte Smith, Bd. Pat. App. & Interf. June 25, 2007. <http://www.uspto.gov/web/offices/dcom/bpai/prec/fd071925.pdf>).

The Examiner argues that the combination of Naigaishi and Furuta is obvious because it is applying a known technique to a known device ready for improvement to yield predictable results. Naigaishi discloses a base device of enabling a beauty analysis using image processing and also discloses that separate cameras can be used from different angles and their images combined. Furuta discloses a well

known technique of taking multiple images and combining them to form three dimensional images. One of ordinary skill in the art would have recognized that applying the known technique of Furuta to the system of Naigaishi would have yielded the predictable result of analyzing a three-dimensional image to propose to the subject a makeup for affecting the skin condition.

Furthermore the Examiner argues that known work in one field of endeavor may prompt variations of it for use in either the same field or a different one based on design incentives or other market forces if the variations would have been predictable to one of ordinary skill in the art (See *Ex parte Smith*, Bd. Pat. App. & Interf. June 25, 2007). It is noted that the scope and content of Naigaishi and Furuta are in the same field of endeavor of selling cosmetics. There would be a design incentive which would have prompted one of ordinary skill in the art to adapt Naigaishi to make a three-dimensional beauty simulation since it would allow the user to form a more realistic picture of how the makeup would affect them. The difference between Naigaishi and Furuta is that Naigaishi uses two-dimensional images whereas Furuta discloses three dimensional images. Converting two-dimensional images to three-dimensional images is a principal that is well known in the field of image processing as disclosed by Furuta. One of ordinary skill in the art in view of the design incentives that a three-dimensional image would be more realistic than the two-dimensional images would have predicted that implementing the teachings of Furuta to the system of Naigaishi would allow the system of Naigaishi to be more realistic looking and thus sell more of the cosmetic product.

Thus the Examiner finds that there is motivation for combining Naigaishi and Furuta to obtain the invention of claim 20.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

B1. The Examiner respectfully disagrees with this argument for the same reasons pointed out in A1.

B2. The Examiner respectfully disagrees with this argument. The Examiner again refers to the recent board decision of KSR which forecloses the argument that a specific teaching, suggestion, or motivation is required to support a finding of obviousness (See *Ex parte Smith*, Bd. Pat. App. & Interf. June 25, 2007. <http://www.uspto.gov/web/offices/dcom/bpai/prec/fd071925.pdf>).

Specifically, the claim would have been obvious because the substitution of one known element or another would have yielded predictable results to one of ordinary skill in the art at the time of the invention. At the time of the invention it would have been obvious

to one of ordinary skill in the art to make the 3d model as discussed by Furuta using a 3d frame. The prior art of Furuta disclosed forming three dimensional images of the user but does not explicitly disclose the details of how this is done. It is well known to use a polygonal wireframe model to obtain a 3d face model as disclosed by Nobori. One of ordinary skill in the art could have substituted the system of forming a polygonal wireframe model to obtain the synthesized 3d model of Furuta in a way that would be predictable to one of ordinary skill in the art.

C1. The Examiner respectfully disagrees with this argument for the same reasons pointed out in A1.

C2. The Examiner respectfully disagrees. The Examiner again refers to the recent board decision of KSR which forecloses the argument that a specific teaching, suggestion, or motivation is required to support a finding of obviousness (See *Ex parte Smith*, Bd. Pat. App. & Interf. June 25, 2007.

<http://www.uspto.gov/web/offices/dcom/bpai/prec/fd071925.pdf>).

Specifically the claims would have been obvious because a particular known technique was recognized as part of the ordinary capabilities of one skilled in the art. The prior art of Naigaishi and Furuta contain the base device of using image processing to analyze the face of a person. Cosatto discloses a known technique of using color calibration in order to track the facial features so that reliable measurements of the outline of the facial features are obtained (col. 8 lines 15-41 of Cosatto). One of ordinary skill in the art

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would have recognized that applying the known technique would have yielded the predictable result of obtaining reliable measurements of the facial features.

D1. The Examiner respectfully disagrees with this argument for the same reasons pointed out in A1.

D2. The Examiner respectfully disagrees. The Examiner again refers to the recent board decision of KSR which forecloses the argument that a specific teaching, suggestion, or motivation is required to support a finding of obviousness (See *Ex parte Smith*, Bd. Pat. App. & Interf. June 25, 2007.

<http://www.uspto.gov/web/offices/dcom/bpai/prec/fd071925.pdf>).

Specifically the claims would have been obvious because a particular known technique was recognized as part of the ordinary capabilities of one skilled in the art. The prior art of Naigaishi, Furuta, and Cosatto contain the base device of using image processing to analyze the face of a person. Vinas discloses a known technique that if a user is very sensitive to color issues then he may manually initiate a color calibration at any time (paragraph 46). One of ordinary skill in the art would have recognized that applying the known technique of Vinas would have yielded the predictable result of allowing the user more control over the system to achieve a more desirable result.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

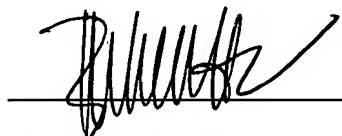
Respectfully submitted,



John Strege

For: Bhavesh M. Mehta

Conferees:



Bhavesh M. Mehta
BHAVESH M MEHTA
SUPERVISORY PATENT EXAMINER
Supervisory Patent Examiner
TECHNOLOGY CENTER 2600

JINGGE WU
SUPERVISORY PATENT EXAMINER

Jingge Wu

Supervisory Patent Examiner